Fairview International School Subang Sdn Bhd v Tribunal Tuntutan Pengguna Malaysia & Anor

HIGH COURT (SHAH ALAM) — JUDICIAL REVIEW NO 25–69–11 OF 2013
LIM CHONG FONG JC
7 NOVEMBER 2014

Civil Procedure — Judicial review — Application for — Consumer Claims Tribunal — Private school ordered to return security deposit to student — Claim for deposit of enrolment — Whether school entitled to forfeit deposit — Whether private schools fall under provisions of the Consumer Protection Act 1999 — Whether claimant was 'consumer' — Meaning of 'consumer' — Consumer Protection Act 1999 ss 2(2)(e), (f), 3, 24A & 85

The second respondent was the parent to one Sabheena who was a student in the school operated by the applicant. Sabheena enrolled in the school in Year 8 on 25 April 2011. At that time, the school operated on three terms of four months duration per academic year. Sabheena's enrolment was subjected to the school's regulations ('terms and conditions') which were, inter alia: in the event of withdrawal of the student from the school, one full academic term notice in writing must be given in advance failing which the security deposit shall be forfeited in full; and the school reserved the right to amend the terms and conditions from time to time. The second respondent was unhappy with the school's decision of not allowing Sabheena to take Chemistry as a subject in Year 10 as it was alleged that Sabheena's performance in Chemistry did not qualify her to take the subject further. On 21 January 2013, the second respondent served the withdrawal notice on the school to withdraw Sabheena from semester 1, academic year 2012/2013 and requested the school to refund the security deposit amounting to RM12,500. The school refused to refund the security deposit contending that the notice of withdrawal was insufficient notice. The second respondent then filed a claim with the Tribunal and the Tribunal held in favour of the second respondent. The applicant brought this application for judicial review against the award of the Tribunal. The issues that arose in this case was whether the Tribunal had acted ultra vires and without jurisdiction as the applicant was not covered by the Consumer Protection Act 1999 ('the Act').

Held, allowing the application:

(1) There was no equivalent provision to s 2(2)(f) of the Act in respect of educational facilities, which would have otherwise been provided if that was so intended by Parliament. Parliament must have desired not to

exclude educational facilities by necessary implication on the purposive interpretation of the statute (see para 32).

(2) The definition of 'consumer' in s 3 of the Act is widely couched beyond that of ordinary domestic consumption as commonly understood save that it excludes services availed for commercial purposes. As for locus standi, although it was not the second respondent but his daughter who benefited and personally received the services from the school, nevertheless the contract was entered between the applicant and the second respondent and the consideration in the payment of fees thereunder was settled by the second respondent. Accordingly, the second respondent was a 'consumer' within the contemplation of the Act and was able to bring the dispute to the Tribunal. Hence, the first respondent had jurisdiction to deal with the dispute (see paras 36–38).

(3) The provision empowering the school to unilaterally amend the terms and conditions was neither objectionable nor unreasonable. It was situational depending on how the provision was utilised and the resultant contents and effect of the amended term or condition. The unilateral alteration of an academic year comprising three terms of four months duration to two semesters of six months duration was not objectionable. This was neither procedurally nor substantively unfair. It was also not heavily imbalanced to the detriment of the parent or student. This amended provision was not void for contravening s 24A of the Act (see para 48).

(4) The applicant was only given two days notice by the second respondent. Hence, even if the amended provision was void, the second respondent was still bound by the original notice provision. The terms of the contract were fully operative and had to be observed. The Tribunal erred in holding that there were extenuating circumstances that justified the second respondent withdrawing his daughter from the school without giving the required notice. There was plainly short notice and this error of law warranted judicial intervention (see paras 49–50).

[Bahasa Malaysia summary

Responden kedua adalah ibubapa kepada seorang yang bernama Sabheena, pelajar di sekolah yang diuruskan oleh pemohon. Sabheena mendaftar masuk di sekolah dalam Tahun 8 pada 25 April 2011. Pada masa tersebut, sekolah beroperasi atas tempoh tiga penggal yang mengandungi empat bulan setiap penggal untuk satu tahun akademik. Pendaftaran masuk Sabheena adalah tertakluk kepada peraturan sekolah ('terma dan syarat') yang mana adalah, antara lain: jika pelajar menarik diri daripada sekolah, notis satu penggal akademik penuh bertulis mesti diberikan terlebih dahulu jika gagal deposit jaminan akan dirampas sepenuhnya; dan sekolah berhak untuk meminda terma dan syarat dari masa ke masa. Responden kedua tidak berpuas hati

dengan keputusan sekolah tidak membenarkan Sabheena untuk mengambil Kimia sebagai subjek pada Tahun 10 kerana ia mendakwa bahawa prestasi Sabheena dalam Kimia tidak melayakkannya untuk mengambil subjek itu selanjutnya. Pada 21 Januari 2013, responden kedua menyerahkan notis penarikan ke atas sekolah untuk mengeluarkan Sabheena daripada semester 1, tahun akademik 2012/2013 dan memohon sekolah untuk membayar balik deposit jaminan berjumlah sebanyak RM12,500. Sekolah menolak untuk membayar balik deposit jaminan dengan berhujah bahawa notis penarikan adalah notis yang tidak mencukupi. Responden kedua kemudiannya memfailkan tuntutan dengan Tribunal dan Tribunal memihak kepada responden kedua. Pemohon membawa permohonan ini untuk semakan kehakiman terhadap award Tribunal. Isu-isu yang berbangkit dalam kes ini adalah sama ada Tribunal telah bertindak ultra vires dan tanpa bidang kuasa kerana pemohon tidak dilindungi oleh Akta Perlindungan Pengguna 1999 ('Akta').

Diputuskan, membenarkan permohonan:

(1) Tidak terdapat peruntukan yang sama kepada s 2(2)(f) Akta berkaitan kemudahan pelajaran, yang mungkin sebaliknya diperuntukkan jika ia adalah niat Parlimen. Parlimen mesti ingin untuk memasukkan kemudahan pelajaran dengan implikasi tersirat atas tujuan taksiran statut (lihat perenggan 32).

(2) Definisi 'consumer' dalam s 3 Akta adalah digunakan secara luas melampaui penggunaan domestik biasa sebagai yang difahami biasanya tetapi ia mengecualikan perkhidmatan-perkhidmatan yang terdapat untuk tujuan perdagangan. Untuk locus standi, walaupun ia bukan responden kedua tetapi anak perempuannya yang mendapat faedah dan secara peribadi menerima perkhidmatan-perkhidmatan daripada sekolah, walau bagaimanapun kontrak dimasuki di antara pemohon dan responden kedua dan balasan dalam bayaran fi di bawahnya diselesaikan oleh responden kedua. Dengan itu, responden kedua adalah 'consumer' dalam pemerhatian Akta dan dapat membawa pertikaian kepada Tribunal. Maka, responden pertama mempunyai bidang kuasa untuk mengendalikan pertikaian tersebut (lihat perenggan 36–38).

(3) Peruntukkan membenarkan sekolah untuk secara satu pihak meminda terma dan syarat bukan boleh dibantah atau tidak munasabah. Ia adalah situasi bergantung ke atas bagaimana peruntukan digunapakai dan kandungan yang timbul dan kesan terma dan syarat yang dipinda. Pindaan unilateral tahun akademik yang terdiri daripada tempoh tiga penggal yang mempunyai empat bulan setiap penggal kepada dua semester yang mempunyai enam bulan setiap semester tidak dibantah. Ini bukan tidak adil secara prosedur atau subtantif. Ia juga bukan terlalu ketidakseimbangan sehingga menjejaskan ibubapa atau pelajar.

Peruntukan yang dipinda ini tidak batal kerana melanggar s 24A Akta (lihat perenggan 48).

(4) Pemohon hanya diberi notis dua hari oleh responden kedua. Maka, walaupun peruntukan dipinda adalah terbatal, responden kedua masih terikat dengan peruntukan notis asal. Terma kontrak adalah beroperasi sepenuhnya dan mesti dipatuhi. Tribunal tersilap dalam memutuskan bahawa terdapat keadaan meringankan yang menjustifikasikan responden kedua dalam mengeluarkan anak perempuannya daripada sekolah tanpa memberi notis yang diperlukan. Terdapat notis pendek yang jelas dan kesilapan undang-undang ini mewajarkan campur tangan kehakiman (lihat perenggan 49–50).]]

Notes

For cases on application for judicial review, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5318–5321.

Cases referred to

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] 2 All ER 680, CA (refd)

Dr Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173; [2012] 4 CLJ 445, FC (refd)

JHW Reels Sdn Bhd v Syarikat Borcos Shipping Sdn Bhd [2013] 7 CLJ 249, HC (refd)

Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd [2014] 2 MLJ 1; [2013] 6 AMR 717, FC (refd)

Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor [2006] 2 MLJ 116; [2006] 1 AMR 277, CA (refd)

Registrar (Evaluation) Bangalore University v Mrs Parida Ansari 1993 (2) CPR 345(347); III (1993) CPJ 1252 (Kant) (refd)

S Ajit v Dr M R Sreedharan Nair 1998 (2) CPR (32) (Kerala) (refd)

Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union [1995] 2 MLJ 317; [1995] 2 CLJ 748, CA (refd)

Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor [2007] 1 MLJ 626; [2007] 1 CLJ 300, HC (refd)

Tenby World Sdn Bhd v Soh Chong Wan & Anor [2013] 10 CLJ 822, HC (not folld)

Legislation referred to

Consumer Protection Act 1999 ss 2(2)(e), (f), 3, 24A, B, C, D, E, F, G, 85

Consumer Protection (Amendment) Act 2010

Education Act 1996 s 103(1)

Indian Consumer Protection Act 1996

Legal Profession Act 1976

National Accreditation Board Act 2007 (repealed by the Malaysian Qualifications Agency Act 2007) s 2

Jasbeer Singh Kaura (Parvinder Kaur Sandhu with him) (Jasbeer, Nur & Lee) for the applicant.
(Adam Abdullah & Mani) for the second respondent.

Lim Chong Fong JC:

INTRODUCTION

[1] This is an application for judicial review brought by the applicant against the award of the Consumer Claims Tribunal; the first respondent.

[2] The applicant is a private incorporated company that operates the Fairview International School (Subang Jaya Campus) in Subang Jaya, Selangor ('the school').

[3] The first respondent is constituted pursuant to s 85 in the Consumer Protection Act 1999 and the second respondent is the parent to Sabheena bt Mohd Adam ('Sabheena') who enrolled as a student in the school.

[4] Leave was obtained by the applicant to file this application on 5 February 2014. In this application (encls 1 and 9), the applicant sought for an order of certiorari to quash or set aside the award of the first respondent No TTPM-B-(P)-611 of 2013 dated 7 October 2013.

[5] The affidavits filed for purposes of this application were:

(a) the applicant's supporting affidavit of Ng Lien Suan affirmed on 28 November 2013;

(b) the applicant's supplementary affidavit of Ng Lien Suan affirmed on 7 January 2014;

(c) the second respondent's affidavit in reply of Muhammad Adam @ Edward bin Abdullah affirmed on 9 April 2014;

(d) the applicant's affidavit in reply of Ng Lien Suan affirmed on 9 May 2014; and

(e) the second respondent's affidavit in reply (2) of Muhammad Adam @ Edward bin Abdullah affirmed on 29 May 2014.

[6] The parties submitted their respective written arguments and I heard the application on 28 August 2014. At the hearing, I directed the parties to further submit written answers on certain points raised by me.

[7] At the hearing, it was agreed by counsel who also represented the parties in other three related cases, to wit: SAHC Judicial Review Nos 25–71–12 of 2013, 25–72–12 of 2013 and 25–73–12 of 2013 that the outcome of this application binds these cases too. These cases were fixed for hearing on the 28 August 2014 as well. By letter dated 8 September 2014, counsel for the parties further agreed that the outcome of this application will also bind SAHC Judicial Review No 25–6–02 of 2014 that is fixed for hearing on 10 October 2014. All these applications share similar background and facts with that in this application.

SALIENT FACTS

[8] The applicant accepted the enrolment of Sabheena in the Year 8 class of the school for Term 3 academic year of 2010/2011. The term commenced on 25 April 2011. At that time, the school operated on three terms of four months duration per academic year.

[9] As contractually agreed by the applicant and the second respondent, Sabheena's enrolment was subjected to the school's regulations (terms and conditions) which were, inter alia, as follows:

> B. Security Deposit
>
> 2. The amount of security deposit required shall be adjusted to reflect the current term fee of the student concerned and is refundable without interest at the end of the student's study or upon withdrawal from the school subject to the following conditions being fully observed:–
>
> a. There are no outstanding fees or monies due to the School from the Student concerned;
>
> b. The School in its sole discretion determines that no harm/damages/breakages to any person or school asset is attributable to the Student concerned; and
>
> c. There is full compliance of the Withdrawal Notice as stated in Section C below.
>
> C. Withdrawal Notice
>
> 2. The School receives sufficient notice of withdrawal of the child which is: ONE FULL academic term notice in writing must be received in advance by the School before the withdrawal of the child of enrolment, to constitute sufficient notice of withdrawal, failing which the security deposit described in Section B shall be forfeited in full.
>
> E. General Terms
>
> 4. The school reserves the right to amend, annul or to add to the terms and conditions for enrolment from time to time and such amended terms and conditions shall be deemed to be applicable to all student enrolled in the school, irrespective of when any student enrolled in the school.

[10] In April 2012, there was a meeting held between the school and the parents of the students in Year 9 on the selection of science subjects that could be taken by the students in Year 10. The parents were informed that students who were not able to achieve the standards set in a science subject would be restricted from taking those subjects. It was however disputed as to whether the second respondent in fact attended the meeting.

[11] Then in May 2012, there was a 'Parent Information Session' held between the school and parents. The parents were informed on the criteria of selection of science subjects at Year 10 and the school gave the parents a brochure that set out the dates for briefing held together with parents through the year. It was also disputed as to whether the second respondent attended the session.

[12] In June 2012, the school gave to the second respondent the subject selection form that was endorsed by the teachers who taught Sabheena. The form stated the selection criteria of science subjects and the terms and conditions of taking the pure science subjects. The criteria were stringent to maintain standard. The second respondent accepted the contents therein and returned the form duly signed. It was stated in the subject selection form that subject selections were based on the grades obtained by the students in the Year 9 examinations.

[13] Since Sabheena only obtained grade 5 in the subject of general science, she did not satisfy the criteria to take the three pure science subjects, to wit Chemistry, Physics and Biology in Year 10. Nonetheless, the school in the subject selection confirmation sent to the second respondent permitted Sabheena to take all the three pure science subjects.

[14] In mid 2012, the school changed its operations to a two semester of six months duration per academic year for the students in Year 10, academic year 2012/2013.

[15] Sabheena's subsequent performance in the pure science subjects was not satisfactory and she was required by the school to drop Physics.

[16] The second respondent's wife then met with the school and appealed to the school that Sabheena be permitted to continue taking Physics on probation. The school in good faith agreed to the proposal on condition that if Sabheena could not demonstrate satisfactory performance in the subjects based on the specified criteria, she would not be allowed to take those subjects.

[17] On 3 December 2012, the school informed the second respondent that Sabheena's performance in Chemistry did not qualify her to take the subject

further. Accordingly she was prohibited from taking Chemistry by the school.

[18] On 21 January 2013, the second respondent served the withdrawal notice on the school to withdraw Sabheena from semester 1, academic year 2012/2013 as from 23 January 2013 and requested the school to refund the security deposit amounting to RM12,500.

[19] The school acknowledged receipt of the withdrawal notice but informed the second respondent that the notice of withdrawal was insufficient notice.

[20] The school did not refund the second respondent and he filed a claimed with the first respondent on 3 September 2013.

[21] By its award dated 7 October 2013, the first respondent held in favour of the second respondent and in consequence, the applicant filed this application.

THE CONTENTIONS OF THE PARTIES

[22] The applicant primarily contended that the first respondent acted ultra vires without jurisdiction by reason that the applicant was not covered by the Consumer Protection Act 1999. In this respect, the applicant specifically relied on the cases of *Telekom Malaysia Bhd v Tribunal Tuntutan Pengguna & Anor* [2007] 1 MLJ 626; [2007] 1 CLJ 300 and *Tenby World Sdn Bhd v Soh Chong Wan & Anor* [2013] 10 CLJ 822. Even if the first respondent had jurisdiction, the applicant contended following the court of appeal case of *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 that the first respondent erred in law for wrongly construing the enrolment contract between the applicant and the second respondent. Consequently the award of the first respondent is bad.

[23] On the other hand, the second respondent contended that the first respondent was clothed with jurisdiction and correctly awarded the second respondent the refund of the deposit as claimed.

FINDINGS OF THE COURT

[24] The law and principles on judicial review have been succinctly analysed and discussed by Vernon Ong J (as he then was) in the *Tenby World Sdn Bhd*'s case. In gist, the principal grounds upon which a court may review a decision of an inferior tribunal or statutory body are:

(a) procedural impropriety;

(b) illegality; and

(c) irrationality.

With regard to illegality, this involves the review of the decision making process such as 'excess of jurisdiction' or 'error of law' and not the merits of the case. As for irrationality, it concerns the exercise of the power by the tribunal or body particularly whether the power had been improperly exercised. This will extend beyond the decision making process to the merits of the decision and include decisions that failed the *Wednesbury* unreasonableness test, arbitrary and illogical decisions as well as those decisions made in bad faith, oppressively or based on considerations which have been accorded manifestly inappropriate weight.

JURISDICTION

[25] Against this backdrop, I will first consider the applicant's contention that the first respondent acted ultra vires without jurisdiction. I am mindful of the *Tenby World Sdn Bhd*'s case where Vernon Ong J found that the Consumer Tribunal had no jurisdiction to determine the dispute also on refund of deposit between another international private school and the parent. In that case, he held at p 830 [23]–[28] as follows:

> [23] The CCT is a public body established under the Consumer Protection Act 1999 (CPA 1999). The jurisdiction of the CCT is limited to the extent expressly stipulated in sub-s (2) of s 2 CPA 1999; and it provides as follows:
>
> (2) This Act shall not apply.
>
> (a) to securities as defined in the Securities Industry Act 1983;
>
> (b) to future contracts as defined in the Futures Industry Act 1993;
>
> (c) the contracts made before the date on which this Act comes into operation;
>
> (d) in relation to land or interests in land except as may be expressly provided in this Act;
>
> *(e) to services provided by professionals who are regulated by any written law; and*
>
> (f) to healthcare services provided or to be provided by healthcare professionals or healthcare facilities. (Emphasis added.)
>
> [24] It is also relevant to note that sub-s. (4) provides that the application of the CPA 1999 shall be supplemental in nature and without prejudice to any other law regulating contractual relations.
>
> [25] As a private educational institution, the applicant is governed by the Education Act 1996 (EA 1996). The Private Education Division under the purview of the Education Ministry serves as the regulatory body in ensuring that all private educational institutions are registered and abide by the laws and regulations

stipulated by the EDA 1996; it also ensures an efficient and effective monitoring and enforcement system.

[26] There is in place a complaints mechanism whereby a person can file a complaint by filling a 'borang aduan' with the private education division. The procedure for complaints is consistent with the existing regulations promulgated under the CPA 1996. In fact, s 126 and 127 of the EA 1996 refers to enquiries and appeals from a decision of the Registrar General in this connection.

[27] At this point, it is also pertinent to observe that the fees imposed by the applicant and the deposit it collected has been approved by the Education Ministry under Regulation 17 of the Education (Registration of Educational Institutions) Regulations 1997 and s 130 of the EA 1996.

[28] It is therefore plain that the applicant is providing services which are specifically regulated and governed by the EA 1996. As such, the application of the CPA 1999 is expressly excluded; and it accordingly follow the first respondent's complaint or claim does not fall within the purview of the CCT; put another way, the CCT has no jurisdiction to hear matters relating to private education. In consequence of the finding, the decision of the CCT is clearly illegal as it had not acted within the terms of power granted to it and within the bounds of the statutory purpose under the CPA 1999.

[26] I have specifically directed the parties to submit further on the ambit of s 2(2)(e) of the Consumer Protection Act. According to the applicant, the word 'professional' has been broadly defined such as in s 2 of the National Accreditation Board Act 2007 as: 'a person whose profession is regulated by a legislation relating to the registration thereof'. According to Wikipedia, the free Encyclopaedia, a 'professional' meant 'a person who is paid to undertake a specialised set of tasks and to complete them for a fee. The traditional professions were doctors, lawyers, clergymen and commissioned military officers. Today, the term is applied to architects, accountants, educators, engineers, scientists, technology experts, social workers and many more.' (Emphasis added.) In addition, s 103(1) of the Education Act 1996 stated as follows: 'Subject to subsection (2), no person shall teach in an educational institution unless he is registered as a teacher under this Act'. Hence and following the reasoning in *Tenby World Sdn Bhd*, the applicant argued that the applicant is excluded from the ambit of the Consumer Protection Act.

[27] The second respondent however argued that the applicant was not so excluded by reason that the applicant wasn't a professional within the contemplation of the Consumer Protection Act notwithstanding that its teachers are registered under the Education Act 1996. It was submitted that the Education Act was not designed to regulate schools and/or teachers but merely to regulate matters pertaining to education per se such as the national education system, assessment of pupils and examinations, registration of teachers and educational institutions. This could be contrasted with the Legal

Profession Act 1976 where the professional conduct and practice of advocates and solicitors are regulated by the statute and rules made thereunder.

[28] The first respondent in its award stated that even though teaching has been often referred to as the 'teaching profession'. The professional envisaged under s 2(2)(e) of the Consumer Protection Act are those professionals that are regulated by any written law such as lawyers, doctors, engineers, etc. The applicant here was not able to show or convince the first respondent that teachers or the teaching profession came under this category. The first respondent was also not shown any provision in the Education Act that regulated the teachers of private schools.

[29] On interpretation of statutes, Mohd Ghazali Yusoff FCJ said in the Federal Court case of *Dr Koay Cheng Boon v Majlis Perubatan Malaysia* [2012] 3 MLJ 173 at p 196; [2012] 4 CLJ 445 at p 472 [48] that:

> A statute is the written will of the Legislature and it is the fundamental rule of interpretation of a statute that it should be expounded according to the intent of Parliament. *The courts must use the literal rule where a clear meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning*. (Emphasis added.)

Also in the Federal Court case of *Lembaga Hasil Dalam Negeri Malaysia v Alam Maritim Sdn Bhd* [2014] 2 MLJ 1; [2013] 6 AMR 717, Suriyadi Halim Omar FCJ held at p 10 (MLJ); p 724 (AMR) [14] and [15]:

> In gist, when interpreting provisions in a taxing Act the intention of Parliament must be construed from the language used and for the court to interpret it accordingly (*Cheatley v The Queen* (1972) 127 CLR 291; *Attorney-General (Canada) v Hallet & Carey Ltd* [1952] AC 427; *Glaisdale in Farrell v Alexander* [1978] AC 59; *Hatton v Beanmont* [1977] 2 NSWLR 211). The matter may be summarily dealt with if the language is plain and unambiguous and admits of only one meaning. In *Kamla Devi v Takhatmal* AIR 1964 SC 859 the court remarked:
>
> > If the language is clear and unambiguous and applies accurately to existing facts, it shall accept the ordinary meaning, for the duty of the Court is not to delve deep into the intricacies of the human mind to ascertain one's undisclosed intention, but only to take the meaning of the words used by him, that is to say his expressed intentions.
>
> *On the other hand if the words are not so explicit, then it is incumbent upon the court to undertake an exercise to seek out the purpose of Parliament, but without sacrificing justice or importing the absurd*. The purposive approach is not a new concept as way back in *AG v Carlton Bank* [1899] 2 QB 158 Lord Russel of Killowen CJ shot a salvo when he stated that all Acts ought to be construed no differently, 'Whether the Act to be construed relates to taxation or any other subject, viz to give effect to the intention of the legislature'. (Emphasis added.)

[30] I have literally read s 2(2)(e) in the Consumer Protection Act carefully and it is clear to me that the subsection targeted not only professionals but professionals who are regulated by written law. As submitted by the second respondent and adopted by the first respondent, these professionals included lawyers, doctors, engineers and so on where there are specific statutes that govern and regulate their respective professions. For these professionals, they are self regulating. The teachers who are registered under the Education Act do not regulate themselves but subject only to registration by the Ministry of Education.

[31] Besides, I am also of the view that the Consumer Protection Act contemplated that these professionals must necessarily be directly engaged in a contract for service with the consumer. This is to be contrasted with professionals who are hired under a contract of service with an employer that in turn contracted with the consumer as in the case herein where the registered teachers are employees of the applicant school. The school then contracted with the second respondent. This view is fortified when s 2(2)(e) is read in comparison with s 2(2)(f) of the Consumer Protection Act. Section 2(2)(f) concerns healthcare services. This subsection clearly stipulated that the Consumer Protection Act shall not apply to healthcare services provided or to be provided by healthcare professionals *or healthcare facilities*. (Emphasis added.) Thus s 2(2)(f) is wider in the sense that not only individual healthcare professionals such as doctors and nurses are excluded but also the organisation that provided the healthcare facilities such as private hospitals and medical centres.

[32] There is no equivalent provision to s 2(2)(f) in the Consumer Protection Act in respect of educational facilities, which would have otherwise been provided if that so was intended by parliament. Thus, *expressio unius est exclusio alterius* as applied by Mohammad Ariff Yusof J (as he then was) in *JHW Reels Sdn Bhd v Syarikat Borcos Shipping Sdn Bhd* [2013] 7 CLJ 249. In other words, Parliament must have desired not to exclude educational facilities by necessary implication on the purposive interpretation of the statute.

[33] It is because of these two points in paras [29] and [31] hereinbefore that I, with respect, differ with the reasoning of Vernon J in *Tenby World Sdn Bhd*.

[34] I have also directed the parties to submit as to whether the second respondent would be regarded as a consumer as defined in the Consumer Protection Act and accordingly whether the second respondent had locus standi to bring an action against the applicant as a parent.

[35] Section 3 of the Consumer Protection Act reads:

'consumer' means a person who –

(a) acquires or uses good or *services of a kind ordinarily acquired for personal*, domestic, or household *purpose*, use or consumption; and

(b) does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of:

(i) resupplying them in trade;

(ii) consuming them in the course of a manufacturing process; or

(iii) in the case of good, repairing or treating, in trade, other goods or fixtures on land. (Emphasis added.)

[36] It is seen that the definition is also widely couched beyond that of ordinary domestic consumption as commonly understood. It is seen that in the cases of *Registrar (Evaluation) Bangalore University v Mrs Parida Ansari* 1993 (2) CPR 345(347); III (1993) CPJ 1252 (Kant) and *S Ajit v Dr M R Sreedharan Nair* 1998 (2) CPR (32) (Kerala), the Indian courts held that students of courses came within the purview of the Indian Consumer Protection Act 1996. Though the definition as formulated in that statute is not the same as that herein, it is equally wide save that it excluded services availed for commercial purposes.

[37] As for locus standi, it is plain that it was not the second respondent but his daughter who benefited and personally received the services from the school. Nevertheless the contract was entered between the applicant and the second respondent and the consideration in the payment of fees thereunder was settled by the second respondent. The applicant did not contest on this point and it does not seem to be fatal in the Court of Appeal case of *Ramli bin Shahdan & Anor v Motor Insurers' Bureau of West Malaysia & Anor* [2006] 2 MLJ 116; [2006] 1 AMR 277. In that case which concerned an insurance claim, PS Gill JCA said at p 130 (MLJ); p 292 (AMR) that:

> *Against this backdrop we can say with equanimity that when a contract as in our present instance is made between the first respondent and second respondent for the benefit of the appellants, then the second respondent can sue on the contract for the benefit of the appellants, and recover all that the appellants would have recovered as if the contract had been made by the appellant himself.* Implicit in this proposition of ours, is the fact that if the second respondent fails in his duty, the appellants as beneficiaries under the implied trust, may successfully maintain an action against the first respondent and second respondent as joint defendants. This issue of locus of the appellants, to sue, is for purposes of this appeal *cadit quaestio*. (Emphasis added.)

Accordingly, I find and hold that the second respondent would in the circumstances be treated as the consumer within the contemplation of the Consumer Protection Act and be able to bring the dispute to the consumer

tribunal notwithstanding that it was his daughter who directly benefitted from the services of the applicant.

[38] Based on the aforegoing, I therefore find and hold that the first respondent had jurisdiction to deal with the dispute brought by the second respondent.

ERROR OF LAW

[39] The next consideration is whether the award of the first respondent ought to be interfered for error of law as alleged by the applicant.

[40] The material part of the award of the first respondent reads as follows:

> Taking all of the above facts into consideration, this Tribunal is of the view that there are extenuating circumstances that justify the Claimant withdrawing his child from the school by not giving the required notice. If the Claimant were to serve the 6 months' notice as required, and withdraw his child from the Respondent's school, a lapse period of 6 months would mean that the child would lose half a year of education in the new school (which may be of a different syllabus/curriculum) and may have a problem in catching up on the lessons.
>
> On the arbitrary change of the academic term to a 2-Term could also be termed as an unfair contract term under s 24A(c) of the CPA. It is noted that the respondent has not denied that it has changed it's yearly term from a 3-Term to a 2-Term. No reasons were offered for its change and no evidence were tendered that the Claimant was informed of this change in the terms. The change effectively changes the notice period from 4 months to 6 months to the detriment of the Claimant. An 'unfair term' under the aforesaid section means a term in the consumer contract which causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer.

[41] As to the principle to be applied on errors of law as alleged by the applicant, Gopal Sri Ram JCA (as he then was) in *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317; [1995] 2 CLJ 748 said at p 342 (MLJ); p 765 (CLJ) that:

> It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law for the categories of such an error are not closed. *But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he miscontrues the terms of any relevant statute, or misapplies or mis-states a principle of the general law*. (Emphasis added.)

[42] Upon reading the grounds of the award of the first respondent, my reaction is that the first respondent was sympathetic to the plight of the parent

and student. The first respondent appeared to have been moved by the plea of the second respondent that the applicant was inconsistent in the assessment of the student and the resultant relative prejudice to the academic well-being of the student in having to drop a crucial science subject so young an age thereby depriving a career choice in the future for the child.

However the reality is also that Sabheena was not a strong science student and the school accommodated her at least twice by allowing her to continue studying pure science subjects even though she did not meet the stipulated criteria. The first respondent overlooked the plight of the school in having to find a replacement if a dissatisfied student can at anytime withdraw from the school. There would also be significant financial impact on the school if students withdraw in droves as seen here, which already involved five cases simultaneously. It must not be confused that the central issue at hand is not about the student being bound to continue to study in the school but on the forfeiture of the deposit when the student withdraws without giving the requisite notice.

[43] This forfeiture issue must not be resolved based on compassion but the contractual bargain made by the parties.

[44] In this regard, the relevant terms of the school enrolment contract have been set out in para [9] hereinabove. It is plain that there is the requirement to give one full academic term notice if the student wishes to withdraw from the school, failing which the security deposit would be forfeited in full. There is no exception for waiver of the requisite notice in the event of extenuating circumstances or breach by the applicant. I also noted that the school reserved the right at any time to amend the terms and conditions of the contract.

[45] It is not disputed that the applicant had in 2012 unilaterally amended the duration of the academic term from originally that of a term of four months to a semester of six months. The reasonableness of the amendment as well as the original provision of one full academic term notice were thrown to question in light of ss 24A–24G of the Consumer Protection Act as introduced by the Consumer Protection (Amendment) Act 2010. In this regard, ss 24A–24G read:

> 24A *Interpretation for purposes of Part IIIA*
>
> *In this Part –*
>
> *(a) 'contract' has the same meaning as assigned to it in section 2 of the Contracts Act 1950 [Act 136];*
>
> (b) 'standard form contract' means a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other

contracts normally used in that industry; and

(c) *'unfair term' means a term in a consumer contract which, with regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer.*

24B Application of Part IIIA

Without prejudice to the provisions in the Contracts Act 1950, the Specific Relief Act 1950 [Act 137], the Sale of Goods Act 1957 [Act 382] and the provisions of any other law for the time being in force, the provisions of this Part shall apply to all contracts.

24C General procedural unfairness

(1) A contract or a term of a contract is procedurally unfair if it has resulted in an unjust advantage to the supplier or unjust disadvantage to the consumer on account of the conduct of the supplier or the manner in which or circumstances under which the contract or the term of the contract has been entered into or has been arrived at by the consumer and supplier.

(2) For the purposes of this section, a court or the Tribunal may take into account the following circumstances:

(a) the knowledge and understanding of the consumer in relation to the meaning of the terms of the contract or their effect;

(b) the bargaining strength of the parties to the contract relative to each other;

(c) reasonable standards of fair dealing;

(d) whether or not, prior to or at the time of entering into the contract, the terms of the contract were subject to negotiation or were part of a standard form contract;

(e) whether or not it was reasonably practicable for the consumer to negotiate for the alteration of the contract or a term of the contract or to reject the contract or a term of the contract;

(f) whether expressions contained in the contract are in fine print or are difficult to read or understand;

(g) whether or not, even if the consumer had the competency to enter into the contract based on his or her capacity and soundness of mind, the consumer –

(i) was not reasonably able to protect his or her own interests or of those whom he or she represented at the time the contract was entered; or

(ii) suffered serious disadvantages in relation to other parties because the consumer was unable to appreciate adequately the contract or a term of the contract or its implications by reason of age, sickness, or physical, mental, educational or linguistic disability, or emotional distress or ignorance of business affairs;

(h) whether or not independent legal or other expert advice was obtained by the consumer who entered into the contract;

(i) the extent, if any, to which the provisions of the contract or a term of the contract

A or its legal or practical effect was accurately explained by any person to the consumer who entered into the contract;

(j) the conduct of the parties who entered into the contract in relation to similar contracts or courses of dealing between them; and

B (k) whether the consumer relied on the skill, care or advice of the supplier or a person connected with the supplier in entering into the contract.

24D General substantive unfairness

(1) A contract or a term of a contract is substantively unfair if the contract or the term of the contract –

C

(a) is in itself harsh;

(b) is oppressive;

(c) is unconscionable;

D *(d) excludes or restricts liability for negligence; or*

(e) excludes or restricts liability for breach of express or implied terms of the contract without adequate justification.

(2) For the purposes of this section, a court or the Tribunal may take into account the following circumstances:

E

(a) whether or not the contract or a term of the contract imposes conditions –

(i) which are unreasonably difficult to comply with; or

(ii) which are not reasonably necessary for the protection of the legitimate interests of the supplier who is a party to the contract;

F

(b) whether the contract is oral or wholly or partly in writing;

(c) whether the contract is in standard form;

(d) whether the contract or a term of the contract is contrary to reasonable standards of fair dealing;

G

(e) whether the contract or a term of the contract has resulted in a substantially unequal exchange of monetary values or in a substantive imbalance between the parties;

(f) whether the benefits to be received by the consumer who entered into the contract are manifestly disproportionate or inappropriate, to his or her circumstances;

H

(g) whether the consumer who entered into the contract was in a fiduciary relationship with the supplier; and

(h) whether the contract or a term of the contract –

I *(i) requires manifestly excessive security for the performance of contractual obligations;*

(ii) imposes penalties which are disproportionate to consequences of a breach of contract;

(iii) denies or penalizes the early repayment of debts;

(iv) entitles the supplier to terminate the contract unilaterally without good reason or

without paying reasonable compensation; or

(v) entitles the supplier to modify the terms of the contract unilaterally.

24E Burden of Proof

If a contract or a term of a contract excludes or restricts liability, or excludes rights, duties and liabilities, it is for the supplier relying on such exclusion or restriction to prove that it is not without adequate justification.

24F Power to raise an issue of unfairness

A court or the Tribunal may, in proceedings before it, raise an issue as to whether a contract or its terms are unfair under sections 24C and 24D, even if none of the parties has raised the issue in its pleadings.

24G Effect of unfair terms

(1) In this Part, where a court or the Tribunal comes to the conclusion, having regard to sections 24C and 24D that a contract or a term of a contract is either procedurally or substantively unfair or both, the court or the Tribunal may declare the contract or the term of the contract as unenforceable or void and the court may grant judgment, and the Tribunal may make an award as provided for under section 112 of this Act.

(2) A court or the Tribunal may determine if any of the terms of the contract which are either procedurally or substantially unfair, or both, are severable, and whether and to what extent and in what manner, the remaining terms of the contract can be enforced or given effect to. (Emphasis added.)

[46] The first respondent found and held that the applicant's amended semester duration of six months was void because of s 24A of the Act in that it was made unilaterally by the applicant without informing the second respondent. However the first respondent overlooked that the contract empowered the applicant to make such amendments. She did not construe this empowerment provision vis a vis ss 24A—D and even if this provision was void, whether the original provision that required one full academic term of four months notice was similarly void.

[47] In light of the competitive environment that private schools operate including this school, I do not consider the original provision that require the full academic term of four months withdrawal notice to be neither imbalanced to the detriment of the parent or pupil nor substantively unfair in contravention s 24A or s 24D of the statute. It seems to me to be a reasonable provision to enable the school to properly plan its intake of student population. As a matter of public policy, such provision will in my view also instil commitment and discourage students from switching schools at their whims and fancies in deprivation of other students of a place.

[48] As to the provision empowering the school to unilaterally amend the

terms and conditions, it is my view that such a provision per se is neither objectionable nor unreasonable. It is situational depending on how the provision is utilised and the resultant contents and effect of the amended term or condition. For example, an amendment to tighten school discipline to curb rising student delinquency should be acceptable. Conversely, an unjustified sudden major hike in school fees would be unacceptable. The problem here concerned the unilateral alteration by the applicant of an academic year comprising three terms of four months duration to two semesters of six months duration. Consequently, it affected the period of service of withdrawal notice. The purpose of the change could be the betterment of the system of student learning which I do not find objectionable. This is neither procedurally nor substantively unfair to me. It is also not heavily imbalanced to the detriment of the parent or student. The position would however be different if the dominant purpose of the applicant was just to specifically increase the period of service of the notice but there was no evidence adduced by the second respondent to that effect. I am therefore of the view that the first respondent fell into error when it construed this amended provision as void for contravening s 24A of the Consumer Protection Act.

[49] That notwithstanding, the problem here is not that the second respondent gave four instead of six months withdrawal notice that was inadequate. In fact the applicant was only given two days notice by the second respondent. Even if the amended provision is void, the second respondent was still bound by the original notice provision and the first respondent had obviously again overlooked or disregarded that provision. The first respondent appeared to be more influenced by the factual version of the events advanced by the second respondent over the conflicting factual version of the applicant. It is not my function here to review the relative merits of the evidence adduced and the resultant findings of fact by the first respondent. In any event, there was plainly no evidence of waiver of the notice provision on the part of the applicant. It was also not the second respondent's case that the applicant repudiated the contract of which was accepted by the second respondent. In other words, the second respondent did not terminate the contract but merely withdrawn his daughter from the school after giving two days notice. In such scenario, the terms of the contract were in my view fully operative and must be observed.

[50] In the circumstances, I therefore find that the first respondent fell into the more serious error for holding that there were extenuating circumstances that justified the second respondent withdrawing his daughter from the school without giving the required notice. There was plainly short notice and this error of law warrants judicial intervention.

[51] I observed that in the *Tenby World Sdn Bhd*'s case, Vernon Ong J also

saw it fit to quash the award for *Wednesbury* unreasonableness where the consumer tribunal wrongly found that there was no withdrawal notice requirement.

CONCLUSION

[52] For the reasons aforesaid, I hereby grant a certiorari order quashing the first respondent's award dated 7 October 2013 and order costs of RM7,500 be paid by the second respondent to the applicant.

Application allowed.

Reported by Afiq Mohamad Noor